

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of

Amendment of Section 73.606(b),  
Table of Allotments,  
Television Broadcast Stations  
(Marquette, Michigan)

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RM No. \_\_\_\_\_

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**OPPOSITION TO PETITION FOR RULE MAKING**

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## SUMMARY

The Petition for Rule Making filed on behalf of Scanlan Television, Inc. ("Scanlan") offers a preposterous proposal for resolving the mutual exclusivity of six applications for new television stations on Channel 19, Marquette, Michigan. Scanlan's Petition for Rule Making seeks that the Commission allot an additional channel to Marquette and that the Commission allow Scanlan, while retaining cut-off protection, to modify its Marquette Application to specify operation on the new channel. The Petition for Rule Making, however, should be dismissed in light of the infirmities surrounding Scanlan's Marquette Application and the lack of precedent, the unsound spectrum management and the inequities that would be caused by implementing Scanlan's proposal.

In the first instance, Scanlan's Marquette Application was irremediably unacceptable for filing and deserving of summary dismissal. The facilities proposed by the application would create impermissible overlaps with Scanlan's still-pending application for a new television station at Ishpeming, Michigan, a town that comprises essentially the same community as Marquette, and Scanlan's now-granted application for a new television station at Calumet. As such, because Scanlan's Marquette Application did not, and in certain respects could not, seek waivers of the Television Duopoly Rule, which would bar common ownership or control of all the stations specified by the above-listed applications, the last-filed Marquette Application violates the Commission's Inconsistent Application and Multiple Application Rules. In light of these violations, violations that may not be corrected by subsequent amendment, Scanlan's Marquette Application is not only not eligible for cut-off protection but is subject to summary dismissal.

Furthermore, Scanlan's proposal to allot up to six additional channels to Marquette, Michigan, a community of 28,977 persons, is unsupported by Commission precedent, would waste valuable television spectrum, and offers Scanlan an escape from the mutual exclusivity of the Marquette proceeding at the expense of the other applicants. Unlike FM proceedings, the Commission has not, with the exception of one easily distinguishable instance, resolved mutually exclusive television applications by simply allotting additional channels to each applicant. Furthermore, doing so by allotting up to six additional channels (beyond the ones already allotted) to Marquette, at a time when the Commission is in the process of preserving as much television spectrum as possible for the growth of that service, smacks of unwise spectrum management. Finally, given the freezes on new television applications and petitions for rule making recently enacted and/or proposed by the Commission, the resolution of the Marquette proceeding by allotting an additional channel to each of the applicants would be futile, because the necessary petitions for rule making and filing of new applications for those channels would be barred. Thus, Scanlan's Petition for Rule Making proposing to resolve the Marquette proceeding should be dismissed.

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Television Broadcast Stations	)	
(Marquette, Michigan)	)	

**OPPOSITION TO PETITION FOR RULE MAKING**

Mario F. Iacobelli ("Iacobelli"), an applicant for a new television station on Channel 19, Marquette, Michigan,<sup>1/</sup> by his attorneys and pursuant to § 1.405(a) of the Commission's Rules, hereby files his Opposition to the Petition for Rule Making filed by Scanlan Television, Inc. ("Scanlan"), on June 25, 1996 ("Petition for Rule Making").<sup>2/</sup> The Petition for Rule Making seeks to resolve the mutual exclusivity of six applications for Channel 19, Marquette, Michigan, by having the Commission potentially allocate five additional channels to Marquette for use by each of the six competing applicants and to have cut-off protection from competing applications granted to Scanlan's application when amended to specify operation on one of the new channels.<sup>3/</sup> Scanlan's application for Channel 19, Marquette, as originally filed, was not acceptable for filing, however, and subject to summary dismissal,

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<sup>1/</sup> Iacobelli's applications for Crandon and Marquette were filed pursuant to the Commission's Public Notice of February 20, 1996, Report No. A-193.

<sup>2/</sup> The Petition for Rule Making has thus far not appeared on public notice pursuant to § 1.403 of the Commission's Rules. Hence, in light of § 1.405(a) of the Commission's Rules allowing 30 days from the date of public notice for the filing of oppositions to petitions for rule making, this Opposition is timely filed.

<sup>3/</sup> Scanlan also proposes that the Commission allot a sixth additional channel to Marquette in the event any party that has thus far not applied for Marquette expresses an interest in one of the five new Marquette allotments.

rendering completely baseless any notion that Scanlan's application should be granted cut-off protection. Moreover, Scanlan's plan to have the Commission allocate *six* new channels to Marquette, Michigan, is substantively inequitable and defies common sense and sound spectrum management. All told, the instant Petition for Rule Making is just another episode in the story of Scanlan's attempt to impermissibly dominate the television market in Michigan's Upper Peninsula and should be dismissed, in support which, the following is respectfully submitted:

1. *Background.* At the time Scanlan filed an application for a construction permit for a new commercial television station on Channel 19, Marquette, Michigan ("Marquette Application"),<sup>4/</sup> Scanlan has also recently filed an application for a construction permit for a new commercial television station on Channel 4, Crandon, Wisconsin ("Crandon Application"),<sup>5/</sup> and still has pending before the Commission applications for construction permits for new commercial television stations on Channel 10, Ishpeming, Michigan ("Ishpeming Application"),<sup>6/</sup> and a now-granted application for a construction permit for a new commercial television station on Channel 5 in Calumet, Michigan ("Calumet

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<sup>4/</sup> FCC File No. BPCT-960111KO. Mutually exclusive competing applications for Channel 19, Marquette, were filed by five parties: Northern Michigan Family Broadcasting (FCC File No. BPCT-960504LM), Mario F. Iacobelli (FCC File No. BPCT-960403KI), Winstar Broadcasting Corp. (FCC File No. BPCT-960404KZ), Redwood Broadcasting, Inc. (FCC File No. BPCT-960405KS), and Barry Shapiro (FCC File No. BPCT-9604052L).

<sup>5/</sup> FCC File No. BPCT-950915KI. Scanlan has since, in light of Iacobelli's Petition to Deny and Supplement to Petition to Deny, pledged to voluntarily dismiss the Crandon Application. Scanlan filed a Request to Dismiss Application for its Crandon application on May 29, 1996.

<sup>6/</sup> FCC File No. BPCT-941116KH.

Application").<sup>7/</sup> At the time it was filed, the Marquette Application stated that "[t]he Grade B contour of the station proposed in the Ishpeming Application would overlap the Grade B contour of the station proposed in th[e Marquette] Application," but it did not contain any request for a waiver of the Television Duopoly Rule, 47 C.F.R. § 73.3555(b).<sup>8/</sup> The Marquette Application also recognized that "[t]here is . . . Grade B contour overlap between the station proposed in th[e Marquette] Application and the Calumet Station[.]"<sup>9/</sup> The Marquette Application did not recognize that the predicted Grade B contour of the facilities

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<sup>7/</sup> FCC File No. BPCT-950412KF. The Calumet Application was granted with the caveat that the satellite waiver request contained therein (due to an overlap between the Ishpeming Application and the Calumet Application) will be considered in connection with the Ishpeming Application. See Letter of March 6, 1996, from Barbara A. Kreisman, Chief, Video Services Division. In light of that caveat, the Commission granted the Calumet Application conditioned upon Scanlan constructing a main studio within its principal community contour due to the possibility that the Ishpeming Application may not be granted. Id. at 1 n.1. The Calumet Application was also granted without acknowledgment of the overlap with the Crandon Application. See infra.

<sup>8/</sup> In fact, the Marquette Application did the opposite of requesting a waiver when it stated that "[a]t such time as the Ishpeming Application may be granted (or, if necessary, when it appears that the Ishpeming matter may proceed to hearing), Scanlan or its affiliate will take such steps as are necessary to comply with the Commission's multiple ownership rules then in effect." Marquette Application at Exhibit B.

<sup>9/</sup> Once again, the Marquette Application did the opposite of requesting upfront a waiver of the Television Duopoly Rule, stating, "[i]f Applicant becomes the licensee of the Calumet Station, it plans to operate the Calumet Station in tandem with the Marquette Station, and will, if necessary, request an appropriate waiver of the Commission's multiple ownership rules at the appropriate time." Marquette Application at Exhibit B. The Marquette Application did not recognize that Scanlan had, via Exhibit B of the Marquette Application, thus proposed to operate the Calumet Station as a satellite of both Channel 10, Ishpeming, and Channel 19, Marquette, a clearly impermissible state of affairs under the Commission's Rules. See Iacobelli Supplement to Petition to Deny at 7.

specified in the Crandon Application would overlap<sup>10/</sup> with the predicted City Grade, Grade A and Grade B contours of the facilities specified in the Marquette Application, nor did it reveal the extent of overlap<sup>11/</sup> between the facilities specified in the Ishpeming Application and the facilities specified in the Marquette Application.<sup>12/</sup>

2. On April 3, 1996, Iacobelli filed applications for construction permits for new television stations for Channel 4, Crandon, Wisconsin, and Channel 19, Marquette, Michigan, that are mutually exclusive with, respectively, Scanlan's Crandon Application and Marquette Application. Iacobelli subsequently filed the Petition to Deny the Crandon Application and the Marquette Application referenced in note 10, supra, on grounds that those applications

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<sup>10/</sup> All overlaps referred to herein may be verified by reference to the Engineering Statement appended to the Petition to Deny the Marquette Application and the Crandon Application filed by Iacobelli on April 4, 1996. That Petition to Deny, the Supplement thereto, Scanlan's Opposition to both Petitions, and Iacobelli's Reply to Scanlan's Opposition to those pleadings are attached hereto as Exhibits A, B, C, and D for the convenience of the reader.

<sup>11/</sup> The predicted City Grade contour overlap of the two stations would be 97%, the overlap between the Grade A contours of the stations would be 99.9%, and the overlap between the Grade B contours 100%

<sup>12/</sup> The Crandon Application also failed to acknowledge the various contour overlaps that would exist between the facilities proposed by that application and those proposed by both the Ishpeming Application and the then-pending Calumet Application, and, like the Marquette Application, the Crandon Application did not request a waiver of the Television Duopoly Rule even though that rule would otherwise prohibit common ownership of the stations proposed by those three applications. The facilities proposed by the Crandon Application would have created overlap between (1) the predicted Grade A contour of Crandon Channel 4 and the predicted Grade B contour of Ishpeming Channel 10, (2) the predicted Grade B contour of Crandon Channel 4 and the City Grade Contour of Ishpeming Channel 10, (3) the predicted Grade B contours of the Crandon and Ishpeming stations, and (4) the predicted Grade B contours of Crandon Channel 4 and Calumet Channel 5. However, pursuant to its Opposition to Petition to Deny, Scanlan has filed a motion to voluntarily dismiss the Crandon Application. See supra note 5.



violated the Commission's Inconsistent Application Rule, 47 C.F.R. § 73.3518, and Multiple Application Rule, 47 C.F.R. § 73.3520, due to the various unrecognized contour overlaps set forth above and the failure of the Marquette Application to include requests for waivers of those rules. This resulted in Scanlan's April 5, 1996, filing of amendments to the Crandon Application ("Crandon Amendment") and the Marquette Application ("Marquette Amendment"). Iacobelli then filed the Supplement to Petition to Deny ("Supplement") referenced in note 10, supra, addressing the new information presented by the Crandon and Marquette Amendments. On May 15, 1996, Scanlan filed its Opposition to Iacobelli's Petition to Deny and Supplement to Petition to Deny, and on May 28, 1996, Iacobelli filed the Reply to Opposition to Petition to Deny referenced in note 10, supra. On June 25, 1996, Scanlan filed the instant Petition for Rule Making seeking to have additional allotments made to Marquette, Michigan, for use by each of the six mutually exclusive Marquette applicants and to have cut-off protection afforded Scanlan's application when amended to specify operation on one of the new channels allotted to Marquette.

**I. SCANLAN'S APPLICATION FOR A NEW TELEVISION STATION ON CHANNEL 19 AT MARQUETTE, MICHIGAN, IS NOT ENTITLED TO CUT-OFF PROTECTION OR EVEN PROCESSING BY THE COMMISSION BECAUSE THE APPLICATION IS IRREDEMIABLY UNACCEPTABLE FOR FILING DUE TO ITS VIOLATION OF THE INCONSISTENT APPLICATION RULE AND THE MULTIPLE APPLICATION RULE.**

3. As demonstrated by the pleadings referenced in note 10, supra, and incorporated by reference herein, Scanlan's Marquette Application was not acceptable for filing at the time it was filed because that application violates both the Inconsistent Application Rule and the Multiple Application Rule. Because of the significant overlaps between the Marquette Application and the Ishpeming and Calumet Applications -- overlaps

so large that even a cursory reading of Commission precedent would compel a conclusion that the implicated applications may not all be granted -- the Marquette Application violates the Commission's prohibition on inconsistent applications filed by the same applicant. In addition, given that there is a 97% City Grade, 99.9% Grade A and 100% Grade B contour overlap between the facilities specified by the Marquette Application and the earlier-filed Ishpeming Application, the Marquette Application violates the Multiple Application Rule's prohibition against one applicant controlling more than one application for stations of the same class to serve the same community.<sup>13/</sup> Moreover, because these infirmities arising from the Marquette Application's failure to request the necessary waivers of the above-described rules may not be corrected by subsequent amendment of the application, the application must be dismissed. Therefore, Scanlan's Marquette Application is by no means either eligible for the cut-off protection sought by the Petition for Rule Making, or a proper application from which a proposal to resolve the mutual exclusivity in the Marquette Channel 19 proceeding may emerge. As such, the instant Petition for Rule Making should be summarily dismissed.

**II. SCANLAN'S PROPOSAL TO HAVE THE COMMISSION ALLOCATE UP TO SIX ADDITIONAL CHANNELS TO MARQUETTE, MICHIGAN, IS UNSUPPORTED BY FCC PRECEDENT, SMACKS OF UNWISE SPECTRUM MANAGEMENT AND LACKS A LOGICAL BASIS.**

4. Scanlan proposes that the Commission initiate a rule making proceeding to amend the TV Table of Allotments, 47 C.F.R. § 73.606(b), to allocate an additional channel

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<sup>13/</sup> As demonstrated in Jacobelli's Reply to Opposition to Deny attached hereto as Exhibit D at 5-6, and as evidenced by the above-specified contour overlaps between the facilities proposed by the Ishpeming and Marquette Applications, for purposes of the Multiple Application Rule, Ishpeming and Marquette constitute the same community.

to Marquette to allow Scanlan to amend its pending Marquette Application. Petition for Rule Making at 1. Scanlan also proposes to have the Commission allocate additional channels for each of the five remaining mutually exclusive Marquette applicants so as not to "favor" any one applicant. Id. at 1-2. In addition, recognizing that other applicants might express interest in the additional five channels for Marquette, Scanlan proposes having the Commission potentially add *another* channel to Marquette should any parties without cut-off protection express interest in serving Marquette in light of the additional channels added to that community. Id. at 5 n 16. All told, in order to resolve the "logjam" created by six mutually exclusive Marquette applications, a resolution whose immediacy no other party to this proceeding or the Commission perceives, Scanlan would have a total of *six* additional television allotments made to Marquette, Michigan, a city with a population of 21,977 persons. Such a resolution of the mutually exclusive applications in this proceeding defies logic, Commission precedent and sound spectrum management and should be summarily dismissed.

5. To justify the addition of up to six extra channels to Marquette, Michigan, and the necessity of adopting so drastic a resolution in this proceeding, Scanlan offers only the fact that "[t]he Upper Peninsula is an area nearly twice the size of the State of Maryland, but has been allotted only 12 channels, compared to Maryland's 19." Id. at 2. By the same logic, one could demonstrate that the State of Alaska, which is nearly **30** times the size of Michigan's Upper Peninsula has been allotted only *twice* as many channels (25) as the Upper Peninsula and that the Commission should immediately address the issue by allotting

(proportionately) an additional 1200 channels to Alaska. All of which, of course, is ludicrous and irrelevant.

6. Allotments of television channels and the stations that ultimately operate on those channels serve people, not land. See, e.g., Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 FCC.2d 1046, 1056 (1975) (key factor in broadcast regulation is population reached vis-a-vis broadcasters' ability to "attract audiences"). Scanlan's attempt to paint Marquette as an allotment-poor community in Michigan's forlorn, underserved Upper Peninsula in order to spur the Commission into allotting up to six more channels to Marquette thus lacks any basis in logic or reality.<sup>14/</sup>

7. Just as Scanlan's characterization of Marquette as vastly underserved defies logic, Scanlan's attempt to steep its proposal in Commission case law is precedentially bankrupt. The only instance of the Commission allotting new television channels to resolve mutual exclusivity among television applicants cited by Scanlan, Albion, Nebraska, 10 FCC Rcd 11927 (1995), is inapposite to the present proceeding. In Albion, the Commission permitted Citadel Communications Company, Inc., to change the community of license of KCAN from Albion to Lincoln, Nebraska, pursuant to Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 3 FCC Rcd 6890 (1988), *recon. denied*, 5 FCC Rcd 7094 (1990). However, as a prerequisite to initiating service on KCAN at Lincoln, the Commission required Citadel to

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<sup>14/</sup> It is also notable in this regard (i) that Maryland, though half the size of Michigan's Upper Peninsula, obviously has a significantly greater population than the Upper Peninsula and (ii) that Marquette County actually experienced an 4.3% *decrease* in population between the 1980 census and the 1990 census.

construct the facilities of a replacement station in Albion and place that station on the air. The mutual exclusivity cited by Scanlan resulted from a second applicant, Fant Broadcasting Company of Nebraska, Inc., expressing interest in the allotment for the replacement Albion station. Thus, in order to allow Citadel to satisfy a *Commission-imposed* precondition to a change of community of license already deemed by the Commission to be in the public interest, the Commission added an additional channel to Albion to allow satisfaction of both the prerequisite to Citadel initiating service in Lincoln and Fant's interest in the new Albion allotment.

8. In the instant case, by contrast, the need to allot additional channels to Marquette perceived by Scanlan arises neither from a Commission determination that satisfaction of some other allotment or service determination made in the public interest requires it, nor from the Commission imposing upon Scanlan (or any other applicant) a requirement that such a need be fulfilled. Rather, the only need for allotting additional channels to Marquette arises from Scanlan's self-imposed imperative to impermissibly dominate the television market for Michigan's Upper Peninsula, see infra, ¶ 11, or from the public interest that will eventually arise from one of the Marquette applicants providing service to that community. There exists no Commission precedent, however, for the proposition that the need to serve the public interest intrinsic in the Commission ultimately selecting one of several mutually exclusive applicants for a television allotment should compel

the Commission to simply allot each such applicant its own channel.<sup>15/</sup> Hence, Scanlan's proposal in the Petition for Rule Making lacks any relevant precedent.

9. Finally, Scanlan's proposal to allot as many as six channels to Marquette in addition to the already-allotted Channel 19 flies in the face of the Commission's efforts to maximize efficiency in the use of spectrum. Currently, there is a freeze on new television applications for communities of license within the minimum co-channel separation distance from the top 30 markets across the country. See In the Matter of Advanced Television Systems and Their Impact on Existing Television Broadcast Service, Mimeo No. 4074, July 17, 1987; 52 Fed. Reg. 283-6 (July 29, 1987). In addition, a freeze on all new television applications will soon take effect, and a freeze on petitions for rule making to amend the existing Television Table of Allotments has already been implemented. See Commission Begins Final Step in the Implementation of Digital Television (DTV Order), Report No. 96-71, July 25, 1996. Moreover, all grants of applications to modify the facilities of existing television stations will soon begin being explicitly conditioned upon the results of the DTV rule making proceeding. Id. It is obvious from the above that, as television as a service

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<sup>15/</sup> While the practice of simply allotting additional channels to resolve mutually exclusive applications is sometimes utilized in FM allotment proceedings, the divergent policy considerations between FM and television have properly restricted that practice to the FM service. First, as discussed infra at ¶¶ 9-10, the spectrum management considerations currently pertinent to television are widely divergent from those involved in the FM service. In addition, allotment priorities for the television and FM services differ in the importance each places on allotting multiple stations to the various communities across the country. Compare Sixth Report and Order on Television Allocations, Vol. 1, Part 3, Rad. Reg. (P & F) 91:601, 91:620 (1952); and Revision of FM Assignment Policies and Procedures, 90 FCC.2d 88, 91 (1982). It is of particular importance that the prospect of allotting an additional channel so as to avoid a comparative hearing is specifically addressed in the above-referenced FM proceeding but not in the Sixth Report and Order.

evolves into its future manifestations, digital and beyond, efficient spectrum management is a key Commission concern.

10. There is no efficiency, however, in occupying as many as nine television allotments for service to Marquette, Michigan. Even assuming *arguendo* that Scanlan is correct in claiming that the Commission considers the "economic impact of an allotment" irrelevant, Petition for Rule Making at 7, allotting an additional six valuable television channels to a community of 21,977 persons defies sound spectrum management and would be a completely excessive resolution to the mutual exclusivity of the Marquette applications. Excess, however, seems to be Scanlan's *modus operandi*. After filing overlapping applications for Ishpeming, Calumet, Branson and Marquette, Scanlan now comes before the Commission proposing that as many as six new channels be allotted to Marquette, Michigan. Such a proposal would inure to the benefit of only Scanlan and would be efficient only in furthering Scanlan's attempts to immediately and impermissibly dominate the television market in Michigan's Upper Peninsula. As such, the instant Petition for Rule Making should be dismissed.

**III. SCANLAN'S PETITION FOR RULE MAKING INEQUITABLY PROVIDES ONLY SCANLAN, AND NO OTHER MARQUETTE APPLICANT, A MEANS OF ESCAPING FROM THE MUTUAL EXCLUSIVITY OF THE MARQUETTE CHANNEL 19 PROCEEDING.**

11. Even if Scanlan's Petition for Rule Making did not propose what must be construed from a spectrum management and policy perspective as an abominable resolution to the Marquette Channel 19 proceeding, Scanlan's proposal is substantively inequitable and should therefore be dismissed. This is so because the Commission's recently adopted freeze on television applications and petitions for rule making bars the other Marquette applicants

from taking advantage of the resolution of mutual exclusivity proposed by Scanlan. The Petition for Rule Making proposes only that one new channel be allotted to Marquette and that Scanlan's Marquette Application be granted cut-off protection so as to allow Scanlan to amend the application to specify operation on the newly allotted channel. Petition for Rule Making at 1, n.1 ("Scanlan proposes that the Commission . . . amend the Table of Allotments for television broadcast stations allot [*sic*] one of the following available channels to Marquette") (emphasis added).<sup>16/</sup> While Scanlan declares that it "would not oppose similar petitions for additional channel allotments from any of the other applicants for Channel 19[.]" *id.* at 1, such an offer is an empty gesture that will in actuality provide no party to the Marquette proceeding, besides Scanlan, the opportunity to have a construction permit granted for Marquette.

12. In the first instance, just as Scanlan had to file the instant Petition for Rule Making to have another channel allotted to Marquette for which Scanlan could then amend its Marquette Application, each of the other competing Marquette Applicants would have to file petitions for rule making to have their respective additional channel allotted. However, as noted at ¶ 9, *supra*, the Commission has imposed a freeze on petitions for rule making to amend the existing Television Table of Allotments. DTV Order at 3.<sup>17/</sup> Second, even if the Marquette applicants were permitted to file the necessary petitions for rule

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<sup>16/</sup> See also *Id.* at 6 ("Scanlan respectfully requests that the Commission allot one of the[ six specified] channels to Marquette") (emphasis added).

<sup>17/</sup> While the Commission may waive the freeze imposed by the DTV Order, there is no public interest basis for doing so for the purposes of allotting up to six additional channels to Marquette, Michigan, a town of 21,977, given that the entire underlying purpose of the freeze imposed by the DTV Order was to preserve sufficient spectrum flexibility for the implementation of digital television.




making to have Scanlan's proposed additional channels allotted, the DTV Order raises the specter that the Marquette applicants would be barred from filing applications for those channels, for the DTV Order also imposes a freeze on new television applications that will take effect before the Marquette Applicants will be able to file their applications. Id. Finally, Scanlan proposes allotting Channels 28, 39, 47, 51, 57 and 60 to Marquette to accommodate its proposal. Petition for Rule Making at 1, n.1. However, pursuant to the DTV Order, the Commission has proposed to reclaim Channels 52-69 to facilitate its allotment of channels for DTV purposes. DTV Order at 4. Therefore, two of the channels proffered by Scanlan to effectuate its proposal for resolving the Marquette proceeding are likely to not be available to the Marquette applicants. All told, Scanlan's Petition for Rule Making, rather than seeking merely to provide new service to Marquette as soon as possible, is a self-serving proposal that inequitably seeks a benefit for Scanlan that cannot possibly be afforded the other Marquette applicants. When combined with the harm proposed to the Commission's spectrum management policies detailed in Section II, supra, the inequity of the resolution of the Marquette proceeding proposed by Scanlan compels the dismissal of its Petition for Rule Making.

13. *Conclusion.* For the foregoing reasons, and for those stated in Iacobelli's pleadings filed against Scanlan's Marquette Application demonstrating that that application is unacceptable for filing, the Commission should immediately dismiss Scanlan's Petition for Rule Making seeking to allot, potentially, an additional six channels to Marquette, Michigan,

and seeking cut-off protection for Scanlan's Marquette Application when that application is amended to specify operation on one of those new channels.

Respectfully submitted,

**MARIO F. IACOBELLI**

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\_\_\_\_\_  
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August 7, 1996

**EXHIBIT A**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of	)	
	)	
SCANLAN TELEVISION, INC.	)	
	)	
For Permit to Construct	)	FCC File No. BPCT-950915KI
New Television Station at	)	
VHF Channel 4,	)	
Crandon, Wisconsin	)	
	)	
For Permit to Construct	)	FCC File No. BPCT-960111KO
New Television Station at	)	
UHF Channel 19,	)	
Marquette, Michigan	)	

TO: Chief, Video Services Division

**PETITION TO DENY**

Mario F. Iacobelli, an applicant for Channel 4, Crandon, Wisconsin, and Channel 19, Marquette, Michigan,<sup>1/</sup> by his attorneys, pursuant to 47 C.F.R. § 73.3584, hereby files a Petition to Deny both the above-referenced applications of Scanlan Television, Inc. ("Scanlan").<sup>2/</sup> Because the above-referenced applications are barred by the Commission's Rules, 47 C.F.R. § 73.3518 ("Inconsistent Application Rule"), and § 73.3520 ("Multiple Application Rule"), the Commission should dismiss the applications, in support of which, the following is respectfully submitted:

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<sup>1/</sup> Applications for Channel 4, Crandon, and Channel 19, Marquette were tendered for filing April 3, 1996, pursuant to Public Notice of February 20, 1996, Report No. A-193.

<sup>2/</sup> This Petition to Deny is timely filed pursuant to Public Notice of February 20, 1996, Report No. A-193, establishing April 5, 1996, as a cut-off date for competing applications and petitions to deny.

## Background

1. On November 10, 1994, Scanlan filed an application for a construction permit for a new commercial television station on Channel 10 at Ishpeming, Michigan ("Ishpeming Application").<sup>3/</sup> The Ishpeming Application did not implicate any of the Commission's multiple ownership rules. On April 12, 1995, while the Ishpeming Application was pending,<sup>4/</sup> Scanlan filed an application for a construction permit for a new commercial television station on Channel 5 at Calumet, Michigan ("Calumet Application").<sup>5/</sup> The Ishpeming Application and the Calumet Application would create both Grade A and Grade B overlap between the predicted signals of both the proposed stations. See Engineering Exhibit 1 ("Engineering Exhibit") at 1 and accompanying coverage map (the "Coverage Map"). The Calumet Application, however, indicated that it was the intent of Scanlan to operate Channel 5, Calumet, as a satellite of Channel 10, Ishpeming, and Exhibit E-8 was styled as a request for waiver of the Commission's television duopoly rule, 47 C.F.R. § 73.3555(b) ("Television Duopoly Rule"),<sup>6/</sup> pursuant to note 5 of that rule.<sup>7/</sup>

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<sup>3/</sup> FCC File No. BPCT-941116KH.

<sup>4/</sup> Three competing applications were filed for Channel 10 at Ishpeming: Application of Uhlmann/Latshaw Broadcasting, L.L.C., FCC File No. BPCT-941107KH; Application of William E. Kring, FCC File No. BPCT-950315KI; Application of Harold Berry, FCC File No. BPCT-950320KJ.

<sup>5/</sup> FCC File No. BPCT-950412KF.

<sup>6/</sup> The Television Duopoly Rule states in relevant part:

No license for a TV broadcast station shall be granted to any party if the grant of such license will result in overlap of the Grade B contour of that station and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party.

2. On September 1 , 1995, Scanlan filed a third application for a construction permit for a new commercial television station, this time for Channel 4 at Crandon, Wisconsin ("Crandon Application"),<sup>8</sup> while the Ishpeming Application and the Calumet Application were still pending. This state of affairs was acknowledged in Exhibit A to the Crandon Application. However, the facilities proposed by the Crandon Application would create overlap between (1) the predicted Grade A contour of Crandon Channel 4 and the predicted Grade B contour of Ishpeming Channel 10, (2) the predicted Grade B contours of the Crandon and Ishpeming stations, and (3) the predicted Grade B contours of Crandon Channel 4 and Calumet Channel 5. See Engineering Exhibit. Yet nowhere in the Crandon Application did Scanlan acknowledge these overlaps, let alone make a request for waiver of the Television Duopoly Rule.<sup>9</sup>

3. Finally, on January 11, 1996, Scanlan filed a fourth application for a construction permit for a new commercial television station, this time for Channel 19 at Marquette, Michigan ("Marquette Application"),<sup>10</sup> while the Ishpeming Application, Calumet

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<sup>2/</sup> The Calumet Application has since been granted, see Letter of March 6, 1996, from Barbara A. Kreisman, Chief, Video Services Division, with the caveat that the satellite waiver request will be considered in connection with the Ishpeming Application. In light of that caveat, the Commission granted the Calumet Application conditioned upon Scanlan constructing a main studio within its principal community contour due to the possibility that the Ishpeming Application may not be granted. Id. at 1 n.1.

<sup>8/</sup> FCC File No. BPT-950915KI.

<sup>9/</sup> The Calumet Application was granted without acknowledgment of the overlap with the Crandon Application, most probably because Scanlan failed to either reveal that overlap in the Crandon Application (which was filed after the Calumet application) or amend the Calumet Application, as required by § 1.65 of the Commission's rules, to reflect the overlap.

<sup>10/</sup> FCC File No. BPT-960111KO.

Application, and Crandon Application were still pending. The Marquette Application acknowledged the pendency of the three aforementioned applications, and stated that "[t]he Grade B contour of the station proposed in the Ishpeming Application would overlap the Grade B contour of the station proposed in th[e Marquette] Application." Marquette Application at Exhibit B. The Marquette Application did not contain request for a waiver of the Television Duopoly Rule, however. Instead, the Marquette Application stated that "[a]t such time as the Ishpeming Application may be granted (or, if necessary, when it appears that the Ishpeming matter may proceed to hearing), Scanlan or its affiliate will take such steps as are necessary to comply with the Commission's multiple ownership rules then in effect." Id.

4. In addition, the Marquette Application recognized that "[t]here is also a Grade B contour overlap between the station proposed in th[e Marquette] Application and the Calumet Station." Again, the Marquette Application did not contain a request for a waiver of the Television Duopoly Rule. Instead, the Marquette Application stated that "[i]f Applicant becomes the licensee of the Calumet Station,<sup>11/</sup> it plans to operate the Calumet Station in tandem with the Marquette Station, and will, if necessary, request an appropriate waiver of the Commission's multiple ownership rules at the appropriate time."<sup>12/</sup> Id. (footnote added).

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<sup>11/</sup> The construction permit for which has already been granted. See supra, notes 6 and 8.

<sup>12/</sup> It is difficult to fathom how the Calumet station can act as a satellite of both the Ishpeming Station, as proposed by the Calumet Application, see supra ¶ 1, and contemplated by the grant of that application, see supra note 6 and 8, while at the same time the Calumet station will be operated "in tandem with the Marquette Station" as proposed by the Marquette Application.

5. The Marquette Application did not recognize that the predicted Grade B contour of the facilities specified in the Crandon Application would overlap with the predicted City Grade, Grade A and Grade B contours of the facilities specified in the Marquette Application. See Engineering Exhibit at 2. Moreover, the Marquette Application did not reveal that between the facilities specified in the Ishpeming Application and the facilities specified in the Marquette Application, the predicted *City Grade contour overlap* of the two stations would be *97%*, the overlap between the Grade A contours of the stations would be *99.9%*, and the overlap between the Grade B contours *100%!*

#### Discussion

6. Scanlan's two last-filed applications -- the Crandon Application and the Marquette Application -- must be dismissed pursuant to the Inconsistent Application Rule, the Multiple Application Rule and the Television Duopoly Rule. The facilities proposed by the two applications would clearly violate the Television Duopoly Rule in several different aspects, some of which extend far beyond the previously granted waivers of that rule in Commission precedent. Due to the manner in which the two applications violate the Commission's Rules, particularly to the extent that (1) Scanlan fails to request most if not all of the waivers necessary to make the applications acceptable for filing, and (2) some of the necessary waivers simply stand no chance of being granted, the Crandon Application and the Marquette Application must be dismissed.

7. That the Crandon Application and the Marquette Application must be dismissed is apparent from even a cursory reading of the Commission's Rules. The Inconsistent Application Rule states:



While an application is pending and undecided, no subsequent inconsistent application may be filed by or on behalf or for the benefit of the same applicant, successor or assignee. 47 C.F.R. § 73.3518.

The Multiple Application Rule states in relevant part:

Where there is one application for new or additional facilities pending, no other application for new or additional facilities for a station of the same class to serve the same community of license may be filed by the same applicant[.] 47 C.F.R. § 73.3520.

The Crandon Application and the Marquette Application clearly implicate and violate one or both of the above rules. The facilities proposed by the Crandon Application would create overlaps between the predicted contours of the Crandon station and the proposed Ishpeming station, as well as between the Crandon station and the then-proposed and now-granted Calumet station. See Engineering Exhibit and Contour Map. As such, pursuant to the Television Duopoly Rule, because the Crandon Application would be inconsistent with the Ishpeming Application and the (then-pending) Calumet Application in the absence of a request for a waiver of the Television Duopoly Rule, the Crandon Application violates the Inconsistent Application Rule. See New Life Enterprises, Inc., 7 FCC Rcd 843 (1992) (applicant must, at the time the second-filed application is tendered, request a waiver of the Television Duopoly Rule if there is any (even *de minimis*) overlap between the facilities proposed by commonly owned applications to avoid violating the Inconsistent Applications Rule).

8. The Marquette Application violates both the Inconsistent Application Rule and the Multiple Application Rule. The facilities proposed in the Marquette Application would create overlaps between the predicted contour of the Marquette station and the predicted contour of the facilities specified in the Ishpeming Application, the Calumet Application, and the Crandon Application. See Engineering Statement and Contour Map. Granted, a request